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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket No. 95-20
Bell Operating Company	)	
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review --	)	CC Docket No. 98-10
Review of Computer III and ONA	)	
Safeguards and Requirements	)	

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COMMENTS OF AMERICA ONLINE, INC.

America Online, Inc. ("AOL"), by its attorneys, and pursuant to the Further Notice of Proposed Rulemaking ("FNPRM") released by the Federal Communications Commission ("FCC" or "Commission") on January 30, 1998, hereby submits these comments for consideration in the above-captioned docket regarding the implementation of the Commission's Computer III and Open Network Architecture ("ONA") rules in light of the Telecommunications Act of 1996 ("1996 Act").[1/]

INTRODUCTION AND SUMMARY

Since its founding in 1985,[2/] AOL has helped to create a vibrant Internet online service medium capable of delivering information, entertainment and interactive services to consumers

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1/ Further Notice of Proposed Rulemaking, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services and 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20, 98-10 (rel. Jan. 30, 1998) ("FNPRM").

2/ Headquartered in Dulles, Virginia, AOL is currently the leading Internet online company, with operations in the United States, Canada, the United Kingdom, France, Germany, Sweden, Switzerland, Austria and Japan. An Australian service is planned for 1998.

around the globe. Today, AOL's Internet online service has approximately 11 million members world-wide, with local dial-up access in roughly 700 cities in the United States alone. AOL's members receive the benefits of original programming and informative content, e-mail capabilities, access to the World Wide Web and informational databases, opportunities to engage in electronic commerce, and opportunities to participate in online "chat" conferences. The vast majority of AOL's members are residential consumers with dial-up connections, using the service for personal education, information, recreation and entertainment.

While the Internet -- and the advanced services it supports and stimulates -- has grown into a vibrant, fledgling medium driven by competition and innovation,[3/] it is essential that the market remain open, robust and fair, especially to the extent competitors must rely largely upon services provided by the former monopoly telecommunications carriers with whom they now compete. Indeed, if independent Information Service Providers ("ISPs") are foreclosed from fair, affordable access to the local exchange services and facilities necessary to offer their information services, the public interest in innovation, lower prices, and improved service quality will suffer. As such, AOL advocates a public policy that maintains and promotes in the telecommunications arena the vigorous competition that has been the watchword of the Internet and the information services industry. Accordingly, as the Commission undertakes this proceeding to address issues

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3/ See Vice President Al Gore, Remarks at the National Press Club (Dec. 21, 1993) <http://www.iitf.nist.gov.documents/speeches/gore_speech122193.html>. Incredibly, in August, 1981, there were 213 computers attached to the Internet. By August, 1997, this number had exploded to over 19 million. Network Wizards, <http://www.nw.com/zone/host-court-history> Jan. 22, 1998. There are now over 45 million "regular" users in the U.S., the majority of whom use the Internet daily. See Jeffrey K. MacKie-Mason, "Layering for Equity and Efficiency: A Principled Approach to Universal Service Policy," February, 1998, at 14 n. 46 ("MacKie-Mason Study"), submitted with AOL's Comments in the FCC's report to Congress on Universal Service, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, (filed January 26, 1998) ("AOL Report to Congress Comments"). Over 2/3 of adult U.S. users, over 20 million individuals, consider the Internet "somewhat" or "very indispensable." Id.

raised by the interplay between its Computer III rules and the safeguards and terminology established in the 1996 Act, the FCC must continue to place primary importance on ensuring that all competitors in the information services industry, whether affiliated with a former Bell Operating Company ("BOC") or independent, have full and fair opportunity to compete for consumers in the marketplace.

As a threshold matter, AOL urges the Commission to conform the definitions it has long used under the "basic services/enhanced services" framework established in its Computer Inquiry proceedings[4/] to the "telecommunications services/information services" terminology of the 1996 Act.[5/] By concluding that the 1996 Act essentially adopted the FCC's basic/enhanced services dichotomy, the FCC will best fulfill the intent of Congress to foster competition, maximize public interest benefits, and provide the certainty and consistency critical to the successful development and deployment of new information services.

The Commission should also require the BOCs to provide all information services through a structurally separate affiliate to ensure they do not have the ability to foreclose competition. While AOL believes that a fully competitive marketplace, rather than regulation,

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4/ Almost twenty years ago, in the Computer II proceeding, the Commission adopted a regulatory scheme that distinguished between basic and enhanced services. It defined a basic service as a common carrier offering of "pure transmission capability" for the movement of information "over a communications path that is virtually transparent in terms of its interaction with customer-supplied information." Computer II Final Order, 77 FCC 2d 384, 420 (1980). It defined "enhanced services" as those services in which computer processing applications "act on the content, code, protocol, and other aspects of the subscriber's information." and provide the subscriber with "additional, different, or restructured information." Id.

5/ Pursuant to the 1996 Act, "information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20). The 1996 Act defines "telecommunications service" as the offering of telecommunications for a fee directly to the public, 47 U.S.C. § 153(46), where "telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

will ultimately provide consumers the maximum public interest benefits and safeguard an open competitive market for ISPs, today ISPs cannot rely solely on market forces for protection against anticompetitive practices. AOL and other ISPs are still largely dependent on the BOCs and other ILECs, with their bottleneck access to essential network components, for local access to their customers -- the same customers for which BOC ISP affiliates now compete. Adopting structural safeguards for BOC provision of intraLATA information services, as is already required for interLATA information services, is consistent with the overall structure and purpose of the 1996 Act, imposes virtually no additional costs on the BOCs, and maximizes the public interest.

In tandem with structural separation, the FCC should also adopt certain nonstructural safeguards to ensure that unaffiliated ISPs can compete with BOC affiliates on a full and fair basis. Specifically, the Commission should require the BOCs to provide needed network functionalities at non-discriminatory, reasonable, and cost-based tariffed rates in a manner that ensures that ISPs and online service providers have access to the local exchange elements they require, both now and in the future. While the Commission need not extend full telecommunications carrier Section 251 rights to ISPs, it should develop a flexible and verifiable process that both enables unaffiliated ISPs to access the services and functions they require and recognizes that the particular functionalities or service elements that ISPs may need are constantly and rapidly evolving.

Finally, the Commission should act to prevent other sources of potential anticompetitive conduct. In this regard, the Commission should continue its "all-carrier" rule, established in the Computer II proceeding, which requires network disclosure by all carriers owning basic

transmission facilities.[6/] AOL does believe, however, that if the FCC adopts the nonstructural and structural safeguards advanced herein, the Commission may discontinue or revise several of the BOC reporting requirements. In doing so, however, AOL urges the Commission to remain mindful of the important policy goals underlying these requirements and ensure that the Commission's ability to prevent and detect anticompetitive behavior has not been compromised. Finally, if the Commission does not require BOC-affiliated information services to be offered through a structurally separated affiliate, it should prohibit BOC joint marketing.

I. THE COMMISSION SHOULD CONFORM ITS BASIC/ENHANCED SERVICES DISTINCTION TO THE DEFINITIONS OF THE 1996 ACT

In the FNPRM, the Commission noted that definitions of "basic service" and "telecommunications service" are not identical and sought comment on whether it should interpret these terms to extend to the same services, conforming FCC terminology to that used in the 1996 Act.[7/] As a threshold matter, AOL urges the Commission to conclude that the long-standing "basic services/enhanced services" definitions from the Computer Inquiry proceedings conform to the "telecommunications services/information services" terminology of the 1996 Act. This approach fulfills the intent of Congress and the fundamental competitive policy goals of the 1996 Act.

As the Commission notes, it has already determined that Congress intended for the definition of the term "information services" to track the Commission's "enhanced services"

6/ The Computer II "all-carrier" rule requires disclosure of "all information relating to network design . . ., insofar as such information affects . . . inter-carrier interconnection . . . ." See FNPRM at ¶ 119

7/ FNPRM at ¶¶ 38-42.

definition.[8/] Indeed, the Commission stressed that there is no basis whatsoever to find that Congress intended to narrow the range of services that the Commission had traditionally included as enhanced.[9/] Rather, in adopting the definitions in the 1996 Act, Congress relied upon the definitions used in the Modification of the Final Judgment ("MFJ"), using the fundamental dichotomy between basic telecommunications transmission services and enhanced information services.[10/] Thus, Congress intended to adopt, rather than amend, the long-standing regulatory framework that had been successfully utilized by the FCC since 1980.

Significantly, there is absolutely no support in either the statutory language or legislative history of the 1996 Act that indicates that Congress intended for the definition of

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8/ As the Commission has noted in its Non-Accounting Safeguards Order, First Report and Order, In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd. 21905, 21956 (1996), ("Non-Accounting Safeguards Order") the definition of an "information service" identifies the same services that are encompassed by the Commission's definition of "enhanced" services: services in which computer processing applications act on the "format, content, code, protocol or similar aspects of a subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

9/ Non-Accounting Safeguards Order 11 FCC Rcd. at 21956 (1996).

10/ In addressing the regulation of services, Congress established specific definitions for "information services," "telecommunications," and "telecommunications service" based upon the terms used in the MFJ. See H.R. Rep. No. 204, Part 1, 104th Cong., 1st Sess. 125 (1995) ("'Information service' and 'telecommunications' are defined based on the definition [sic] used in the Modification of Final Judgment"); cf. United States v. AT&T, 552 F. Supp. 131, 229 (D.D.C. 1982) (subsequent history omitted). In the House-Senate conference on the 1996 Act, the Senate receded to the House on the definition of information service. The House receded to the Senate on the definition of telecommunications, but the House and Senate bills contained similar definitions of this term. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996). See also, United States v. AT&T, 552 F. Supp. at 178, n.198 (subsequent history omitted) ("'enhanced services' . . . are essentially the equivalent of the 'information services' described in the proposed decree").

At roughly the same time as the FCC developed its regulatory framework, "information services" were identified in the MFJ as distinct from basic transmission services. United States v. AT&T, 552 F. Supp. at 225-234 (D.D.C. 1982). See also, United States v. Western Electric Co., 714 F.Supp. 1, 5 (D.D.C. 1988). Pursuant to the MFJ, information services encompassed both services which involved no control by the carrier over the content of information (such as traditional data processing services) and services in which the carrier would control both the transmission of the information and its content. See United States v. AT&T, 552 F. Supp. at 179. The MFJ Court defined "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications." Id. at 229.

"telecommunications service" to diverge from the Commission's long-standing use of the term "basic services." In its Computer II proceeding, the Commission defined a "basic service" as one offering "pure transmission capability" for the movement of information "over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."[11/] Just as the Commission referred to the movement of information "over a communications path that is virtually transparent,"[12/] Congress referred to the same services as transmission that does not change the form or content of information.[13/] Certainly, these definitions refer to the basic underlying transmission function.[14/]

Critically, this approach will maximize public interest benefits. Dating back almost twenty years, this framework has dramatically fulfilled its promise, fostering the dynamic growth and public interest benefits associated with the explosive information services industry.[15/] The Commission early on urged that to accommodate rapid technological development, the types of enhanced services provided should be "limited only by . . . entrepreneurial ingenuity and competitive market constraints. Services need not be structured so as to avoid transgressing a

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11/ Computer II Final Order, 77 FCC 2d at 420.

12/ Id.

13/ 47 U.S.C. § 153(43).

14/ "Layering is the fundamental design principle of modern networks....[T]here are crucial distinctions between telecommunications carriage...and service...An ISP such as AOL provides enhanced information services built on top of the carriage layer. ISPs do not sell carriage per se." See MacKie-Mason Study, supra, at 3-4.

15/ This structure, which was adopted first in 1980 in the FCC's Computer Inquiry II proceeding, reflects a fundamental understanding of the need to remove "the threat of regulation from markets which were unheard of in 1934 and bear none of the important characteristics justifying the imposition of economic regulation by an administrative agency." Computer II, 77 FCC 2d at 423.

regulatory boundary."[16/] Congress sought to foster this same growth when it adopted the 1996 Act.[17/]

Further, clarifying that the 1996 Act builds upon the long recognized basic/enhanced services distinction maximizes administrative efficiency. This regulatory structure allows the Commission to direct its attention where it is most necessary -- "to the regulation of basic services," to the promotion of competition for these basic services, and to "assuring nondiscriminatory access to common carrier telecommunications facilities by all providers of enhanced services."[18/] Industry and regulators also benefit from the certainty of time-tested definitions, critical to the successful development and deployment of the new services that will best serve the public interest. In fact, it was for this reason that the Commission long ago rejected proposals that would classify services on a case-by-case or more ad hoc basis.[19/] As such, the Commission should continue to foster a climate of business certainty rather than an environment that could disrupt business planning and stifle the growth of the information services industry.

16/ Computer II Final Order, 77 FCC 2d at 429. In fact, the Commission correctly emphasized that this market-based approach would sow the seeds of future economic growth. Id. at 422-23. Even before the adoption of Computer II, the FCC had stressed that the computer industry "has become a major force in the American economy" and emphasized that "its importance to the economy will increase in both absolute and relative terms in the years ahead." See Computer I, 28 FCC 2d 267, 268-69, ¶ 7 (1971).

17/ Congress expressly found that the Internet has flourished "with a minimum of government regulation," and stated that its policy was to "promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. §§ 230(a)(4), (b)(1), (b)(2).

18/ Computer II, 77 FCC 2d at 429.

19/ Id. at 423.

II. UNTIL THERE IS GENUINE FACILITIES-BASED COMPETITION, COMPETITIVE SAFEGUARDS COUPLED WITH VIGILANT ENFORCEMENT ARE NECESSARY TO PREVENT BOC ANTICOMPETITIVE BEHAVIOR

Although the Commission has frequently noted the substantial risks of anticompetitive conduct by the BOCs, including improper discrimination or unlawful cost-shifting,[20/] it tentatively concludes that structural safeguards are not necessary because competition will provide ISPs with alternative sources of access to basic services.[21/] AOL agrees with the principle that a fully competitive marketplace, rather than regulation, will ultimately be the best motivation for all providers to provide the quality, innovative, and affordable services consumers want. Full and genuine competition has not yet arrived, however, despite certain progress toward this bedrock goal of the 1996 Act.[22/] As the Commission itself observes, "the BOCs remain the dominant providers of local exchange and exchange access services in their in-region states," accounting for 99.1 percent of the revenue in the local service markets.[23/] Simply put, Internet and online service providers cannot currently rely solely on market forces to protect against anticompetitive conduct, because ISPs remain overwhelmingly dependent on incumbent carriers

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20/ See, e.g., FNPRM at ¶ 43; Non-Accounting Safeguards Order at ¶¶ 10-12; Report and Order, In the Matter of Implementation of the Telecommunications Act of 1996: Accounting Safeguards, 11 FCC Rcd 17539, 17546 (1996).

21/ FNPRM at ¶¶ 48-51, 54.

22/ See S. Conf. Rep. 104-230, 104th Cong., 2d Sess., Preamble (stating that the Act's purpose is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition..."). See also, H.R. Rep. 104-458, 104th Cong., 2d Sess. at 1 (1996).

23/ Non-Accounting Safeguards Order at ¶ 10; FNPRM at ¶ 51, citing Industry Analysis Division, Telecommunications Industry Revenue: TRS Worksheet Data (CCB, Dec. 1996). See also, FNPRM at ¶ 5 ("Congress recognized, in passing the 1996 Act, that competition will not immediately supplant monopolies and therefore imposed a series of safeguards to prevent the BOCs from using their existing market power to engage in improper cost allocation and discrimination. . . . .").

such as the BOCs for local access to their customers.[24/] Accordingly, AOL urges the Commission to adopt sufficient competitive safeguards coupled with vigilant enforcement.

Today, the incentives for a structurally-integrated BOC to engage in cost misallocation or improper discrimination are readily apparent. Every BOC has launched Internet access services in an aggressive fashion.[25/] While it is expected that in a vigorously competitive market competitors will seek to capture market share through any and all means, it is critical to bear in mind that only the incumbent local exchange carriers ("ILECs") have bottleneck access to essential network components. In no circumstances has this dominant bottleneck control been more entrenched than with the BOCs.[26/]

24/ Although AOL seeks to use the services of CLECs to the extent possible, they too are dependent upon BOC efforts to implement local competitive alternatives.

25/ BellSouth, for example, has stated that its Internet service, BellSouth.net, is on a track to be the fastest growing Internet service in the southeast. BellSouth has begun to market its services through its customer service centers, allowing it to offer ISP services to customers placing new orders or service orders for telecommunications services. "BellSouth is the First Regional Bell Company To Sell Internet Service Through Its Telephone Business Offices," BellSouth Press Release, June 2, 1997 <http://www.bellsouth.com/sc/newsroomo/PR-697-5.htm>. Similarly, Pacific Bell's service, Pacific Bell Internet, calls itself "the most successful Internet access start up in California history." Business Wire, "Pacific Bell Internet Tops 51,000 Subscriber Mark In First 3 Months," September 19, 1996 ("Pacific Bell press release"). In 1996, it offered five months worth of free Internet access to any customer purchasing a second telephone line for $11.25 per month. In Re: FCC Bandwidth Forum, January 23, 1997, Transcript at 43. It announced that it was also planning to "co-market[]" its Internet service to Pacific Bell customers who order voice mail, or to those who participate in the Pacific Bell "customer loyalty and retention programs." Pacific Bell press release. See also "Bell Atlantic Announces Plans for Affordable, Easy-to-use Internet Product Line," Bell Atlantic Press Release, April 10, 1996 <http://www.ba.com//nr/96/apr/4-10inet.htm> (announcing intent to enter ISP market and offer discounted pricing with the purchase of second telephone lines or ISDN service); "Ameritech offers dedicated Internet access service," Ameritech Press Release, March 4, 1998, <http://www.ameritech.com/news/releases/mar_1998/04_01.html> (announcing addition of business dedicated access service to other Internet access service offerings).

26/ The Commission has determined, for example, that BOC control over the local exchange and exchange access markets is "one of the last monopoly bottleneck strongholds in telecommunications," and that it is necessary to open these markets "to pave the way for enhanced competition in *all* telecommunications markets." First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15506 (1996) (emphasis in original). See also, e.g., Economics and Technology, Inc. & Hatfield Associates, Inc., The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers, 1994 at ix, 1 (LEC control of numbering, distribution, switching, and transport networks is an "overwhelming dominance" and a "formidable barrier to entry."). This study reported that LECs received $25.7 billion in access revenues, or 99.2 percent of the total market, compared to the $209 million, or 0.8 percent of the market, held by competitive (cont'd)

In these circumstances, it is the role of government to promote competition, including by adopting, in the short-to-medium-term, pro-active safeguards and rules that ensure that no single competitor can unduly foreclose competition. Experience has shown that anticompetitive conduct is likely without both adequate safeguards and vigilant enforcement.[27/] In the area of information services, if growth and development is to continue to flourish, the Commission must ensure that all entities, whether affiliated with the BOCs or independent, can compete in a market which is open and fair.

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providers. Id. at 2, fig. 1.1.

27/ For example, State commissioners in Michigan and Ohio recently outlawed an Ameritech marketing plan which offered consumers who signed up for Ameritech New Media's cable-television service up to $120 per year in vouchers that could be applied to other Ameritech services, including regulated telephone services. Telecommunications Reports, "Michigan ALJ Bounces Americhecks Rebate Program," November 14, 1997; Telecommunications Reports, "Ameritech Plans Appeal of Ohio PUC Voucher Decision," July 21, 1997. Likewise, in 1995, the Illinois Commerce Commission ruled that Ameritech had provided unreasonably discriminatory requirements for interconnection to its local network and reciprocal compensation for the exchange of local traffic. MFS Intelenet of Illinois, Inc. v. Illinois Bell Telephone Company, 1995 Ill. PUC LEXIS 128 (February 8, 1995).

Similarly, in 1994, the Illinois Commerce Commission ruled that Ameritech had charged itself lower access fees than its competitors paid, enabling it to underprice its competitors. MCI Telecommunications Corporation and LDDS Communications, Inc. v. Illinois Bell Telephone Company: Complaint under Articles IX and XIII of the Illinois Public Utilities Act, 93-0044, 1994 Ill. PUC Lexis 417 (October 5, 1994). Further, a 1992 audit commissioned by the Louisiana Public Service Commission identified "numerous instances where BellSouth affiliate transactions were structured to benefit the Company's nonregulated activities." Report to the Louisiana Public Service Commission, Ratemaking and Financial Audit of South Central Bell Telephone Company, Docket No. U-17949, Subdocket A, at ix (August 1992). Other examples abound. For example, in 1991, the Georgia Public Service Commission determined that Southern Bell Telephone ("SBT") used its monopoly control of the local exchange market to impede competition for voice messaging services by discriminatorily denying competitors access to the network, and that "substantial issues of predatory pricing and cross-subsidy [had] been raised" with regard to the pricing of the service. Order of the Commission, In the Matter of the Commission's Investigation Into Southern Bell Telephone and Telegraph Company's Provision of MemoryCallK Service, Docket No. 4000-U, at 67-68 (June 4, 1991). In 1991, after a Justice Department investigation triggered by a "large number of complaints about [U S West's] compliance with the MFJ," U S West admitted violating the MFJ by discriminating in the pricing of exchange access and exchange service, providing prohibited information services, and by manufacturing and selling telecommunications equipment. Joint Motion and Stipulation For Entry of an Enforcement Order, United States v. Western Electric Co., Civil No. 82-0192 at 6-15 (D.D.C. Feb. 15, 1991).

III. THE FCC SHOULD REQUIRE A STRUCTURALLY SEPARATE AFFILIATE FOR THE PROVISION OF INFORMATION SERVICES BY THE BOCS

While AOL acknowledges that the Commission is not required under the 1996 Act to mandate structural separation for intraLATA information services,[28/] AOL asserts that requiring the BOCs to provide all information services through a structurally separate affiliate will be the most effective way to prevent anticompetitive conduct and serve the public interest. Indeed, it is the substantial benefits of structural separation that caused Congress to rely so heavily on this safeguard in the 1996 Act as it opened for the first time new markets to the BOCs.[29/]

Just as Congress relied upon structural separation safeguards to promote an open and robust competitive market because it understood that they are maximally effective in preventing unlawful conduct such as discrimination and cross-subsidization, so too should the FCC. In fact, the need for such protection in the burgeoning information services market is no less important if the services are intraLATA versus interLATA, as ISPs remain largely dependent upon the bottleneck local exchange to reach their customers, the same customers for which BOC-affiliated entities now compete. A requirement that there be structural separation between the BOC information services affiliate and the BOC itself helps ensure that independent ISPs can compete on equal footing.

28/ FNPRM at ¶ 55.

29/ For example, Congress adopted separate subsidiary requirements for registered utility holding company provision of telecommunications services, 47 U.S.C. § 103, manufacturing activities, id. § 272(a)(2)(A), certain interLATA, in region telecommunications services, Id. § 272(a)(2)(B), certain interLATA information services, id. § 272(a)(2)(C), and electronic publishing. Id. § 274. As the Commission has noted, "[t]he structural separation requirements of section 272, in conjunction with the affirmative nondiscrimination obligations imposed by that section, are intended to address concerns that the BOCs could potentially use local exchange and exchange access facilities to discriminate unlawfully against competitors in order to gain a competitive advantage for their affiliates...." Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 18877, 18885 (1996).

Adopting such a requirement for BOC provision of intraLATA information services will impose virtually no additional costs. The BOCs are already required under the 1996 Act to establish separate affiliates for interLATA information services.[30/] As such, it is unclear what additional costs, if any, there would be for any BOC to provide intraLATA information services through the same affiliate. Indeed, to the extent any BOC argues that structural separation will cause it to lose joint efficiencies, the Commission should require the BOC to demonstrate in detail the nature of the alleged inefficiencies and the costs associated therewith. Rather than cause costs, the use of a separate subsidiary in these circumstances could actually increase a BOC's efficiency, since it would not need to establish duplicative entities for intraLATA and interLATA services.

A separate subsidiary requirement would also be administratively efficient, eliminating the ability of the BOC to evade legitimate government regulation and oversight through its ability to arbitrage between interLATA and intraLATA services. Regulators could more easily track costs to detect and address improper cost shifting, as well as detect patterns of discrimination, if all information services were provided through a unified separate subsidy.

Finally, to the extent the Commission may seek to phase out structural separation of intraLATA services in the future, it should assess the continued need for a separate affiliate using a cost/benefit analysis, at such time as the requirement sunsets for interLATA information services.[31/] Specifically, the Commission should establish a complete record, including comment from interested parties, before the proposed sunset date to determine whether competition has

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30/ 47 U.S.C. § 272 (a)(2)(C).

31/ Id. § 272 (f)(2).

evolved sufficiently to warrant an end of the separate affiliate requirement and to revise any other safeguards accordingly.

IV. TO ENSURE THAT UNAFFILIATED INFORMATION SERVICE PROVIDERS CAN COMPETE FAIRLY, THE FCC MUST ALSO ADOPT CRITICAL NON-STRUCTURAL SAFEGAURDS

A. The FCC Should Require the BOCs To Afford Unaffiliated ISPs Access to Basic Network Functionalities Necessary to Provide Information Services

In the FNPRM, the Commission asks whether the "common ONA model" has been effective in ensuring that ISPs have access to the underlying network functionalities that are necessary to provide information services on a fair basis.[32/] Certainly, the FCC's primary goal for ONA, that independent ISPs have access to basic network services on an equal basis with the BOCs' affiliated providers, is sound.[33/] The Commission intended that the ONA rules protect ISPs by requiring that BOCs which provide their affiliates with certain network elements necessary to offer information service must also make those elements available to independent ISPs.[34/]

It has been AOL's experience, however, that the FCC's ONA rules have not been effective as a means to help ISPs obtain the basic services they require to provide information services. In the experience of AOL, the FCC's "common ONA model," which sets forth basic service elements available through basic service arrangements, does not in practice offer efficient, cost-effective access to the functionalities ISPs currently need. Indeed, to the extent that ISPs do actually use the ONA process to access the BOCs' network, the ONA process may

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32/ FNPRM at ¶ 86.

33/ FNPRM at ¶ 9.

34/ FNPRM at ¶¶ 80-84.

force ISPs to purchase unnecessary services or functionalities that are embedded within the current ONA plans.

Further, under the FCC's ONA process, the Commission did not actively police new technological, operational, and regulatory issues as they surfaced, but, rather, left the discussion and resolution of ONA issues to the Information Industry Liasion Committee ("IILC").[35/] The IILC, while a standard-setting forum, has often been referred to as "dominated by the BOCs and Bellcore," which did not fairly represent the views of all different industry segments.[36/] In light of these shortcomings, it is not surprising that the Ninth Circuit found that the FCC's ONA process could not prevent the BOCs from discriminating against independent ISPs by raising impermissible technical barriers and giving them inferior access to their local networks.[37/] Accordingly, AOL agrees that a new approach is needed as we stand at the crossroads of vast service and technological growth.

In this vein, the Commission seeks comment as to whether it should extend to ISPs unbundling rights similar to those found in Section 251 of the 1996 Act.[38/] Rather than extend

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35/ On January 1, 1997, all IILC open issues and work programs were transferred to the Network Interconnection/Interoperability Forum ("NIIF"). There is no evidence that the NIIF has been more successful than its predecessor.

36/ See In the Matter of Filing and Review of ONA Plans, 4 FCC Rcd 1, 32 (1988). See also "MCI Slams ONA Regime, Says Alleged BOC/Bellcore Conspiracy on ISDN Undermines Policy," Telecommunications Reports at 31 (January 11, 1993). As evidence that the FCC's ONA process was "a failure," MCI cited an affidavit filed by a former Bellcore employee which stated that he had participated in a conspiracy with the Bell operating companies to establish technical standards for ISDN that would ensure BOC monopoly control over access to ISDN in order to prevent competition. Id.

37/ See California v. FCC, 39 F.3d 919, 929 (9th Cir. 1994) ("California III") cert. denied, 115 S.Ct. 1427 (1995) ("the BOCs have the incentive to discriminate and the ability to exploit their monopoly control over the local networks to frustrate regulators' attempts to prevent anticompetitive behavior. The FCC has not explained adequately how its diluted version of ONA will prevent this behavior.").

38/ FNPRM at ¶ 96. Section 251 requires incumbent carriers to provide "to any requesting telecommunications carrier ... nondiscriminatory access to network elements on an unbundled basis at ... rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). It also requires (cont'd)

full Section 251 rights to ISPs, who are definitionally distinct from telecommunications carriers,[39/] AOL believes the Commission should clearly state that the BOCs may not use their control over the local exchange to favor in any way their affiliated competing entities.

Specifically, the Commission should require the BOCs to provide needed network functionalities at non-discriminatory, reasonable, and cost-based tariffed rates. This approach ensures that ISPs can secure efficient, economic access to the local exchange elements they require to provide their value-added services. A clear Commission directive in this regard will enhance the competitive availability of innovative, quality and low cost information services from diverse providers. By the same token, this approach recognizes the basic difference between information services and telecommunications services since it does not require unbundling to an extent greater than ISPs actually need, nor does it accord any entity an unfair competitive advantage.[40/]

In mandating BOC unbundling for needed ISP services, the Commission should also be mindful of the need to develop a flexible structure that protects ISPs from anticompetitive behavior, both now and in the future. At present, the types of basic services required to offer information services may vary from ISP to ISP, with the type of end user connection, and with the network services, capabilities and functionalities of a particular BOC.

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incumbent carriers to make services available at wholesale rates for purchase by resellers. Id. at § 251(c)(4).

39/ Compare 47 U.S.C. § 153(20) with id. at § 153(43), (44), (46).

40/ These basic unbundling rights would not, however, eliminate the need to require that the BOC enter the intraLATA information services market through a separate subsidiary. Just as the 1996 Act requires both structural and non-structural safeguards in certain instances, such as the provision of interLATA services and the provision of certain information services, see 47 U.S.C. § 274 (electronic publishing services), so too should the FCC require similar safeguards in this increasingly important area of information services.

For example, the needs of an ISP can vary with respect to emerging xDSL services. In some cases, AOL and other ISPs might be able to utilize existing BOC xDSL services in providing information services to their customers. To do this, the ISP may or may not need only physical collocation in the BOC central offices. In other instances, an independent ISP might seek to compete with a BOC-affiliated ISP in circumstances where there is a line card in the central office switch by securing collocation rights for equipment which is functionally equivalent. How an ISP proceeds will depend upon how the BOCs configure their networks to deploy xDSL and other high-speed services.[41/] It is precisely these types of developments which the Commission should bear in mind as it develops a comprehensive policy.

The Commission's rules must also preserve the ISPs' flexibility to select only those functionalities and services that they want and need rather than set forth a fixed structure that could cause ISPs to purchase unwanted and duplicative "bundled" functionalities that would unnecessarily drive up their cost of doing business. Permitting BOCs to tie unwanted services to necessary ones will place unaffiliated ISPs at a significant competitive disadvantage compared to the BOCs' own affiliated ISPs. Indeed, even if the BOCs required their affiliated ISPs to purchase the unnecessary, bundled service, the payment would be an internal transfer instead of a

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41/ For example, ISP needs and access requirements may vary depending on how the BOCs opt to deploy xDSL. DSL services require continuous copper connectivity by locating a data/voice splitter, called a remote DSL transceiver unit, at the end user's premises and at the ILEC central office to separate the data voice traffic. Indeed, the splitting function at the end user side may or may not be necessary depending upon the exact xDSL technology selected. The splitter at the central office routes voice traffic to the voice switch on the PSTN network and completes the call. When data calls are placed, they travel the same path and voice calls to the splitter at the central office, where data calls are then routed to a DSLAM and mulitplexed on to a backbone data network. Alternatively, the splitter function can be subsumed in the central office switch by using a new form of line card. See "News Digest: DSL Steps Up: Service Options on the Way," IAC Newsletter Database (March 1, 1998); see also Press Release, "Aware, Inc. Announces Availiability of Universal ADSL Modems, Modules, and Software," (Jan. 26, 1998).

net cost. Using the xDSL example, such bundling could require ISPs to pay for certain transport, DSLAM, and other costs that they neither want nor need.

The Commission should also recognize that the particular functionalities or service elements that ISPs may need to provide service are constantly evolving. Given the rapid pace at which technological advancements are being made in the information services marketplace, it is virtually impossible for either service providers, such as the ISPs or the BOCs, or for regulators such as the FCC, to predict all of the functionalities and services that ISPs may need in the future. The Commission should therefore clarify that ISPs are entitled to full and fair access to additional and as-yet unspecified BOC functionalities as additional technologies are deployed. ISPs should have the opportunity to request access to these additional functionalities on an as-needed basis.

To ensure that such a requirement is effective, the Commission should consider adopting an expedited review process in which it would handle such requests on an as-needed basis. The FCC should expedite the process itself, and should not offload this responsibility to a self-regulating body, as it did with ONA. Likewise, AOL urges the FCC to consider establishing an access documentation and certification process, similar to that established for the FCC's CPNI rules, to track ISP needs, the success of its rules and policies, and to provide verification in the event of subsequent disputes.[42/]

42/ See In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information ("CPNI") and Other Customer Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-115, CC Docket No. 96-149, Second Report and Order and Further Notice of Proposed Rulemaking at ¶¶ 199-201 (rel. Feb. 26, 1998). The Commission's CPNI rules require each carrier to maintain an electronic audit mechanism that tracks access to customer accounts, and records whenever customer records are opened, by whom, and for what purpose. The goal of this is, inter alia, to afford a means of documentation that would either support or refute claimed deliberate carrier CPNI violations. Id. at ¶ 199. The (cont'd)

B. The FCC Should Ensure that Independent Information Service Providers Have Full Information Needed to Offer Information Services

Finally, the Commission has questioned whether to discontinue or revise some or all of the ONA reporting requirements, noting that some of the information it requires to be disclosed "may no longer be useful, relevant, or related to either the safeguard or competition promotion functions. . . ."[43/] AOL supports this initiative as a general matter, agreeing that the FCC should not retain unwarranted or unnecessary regulatory processes.

In the absence of a fully competitive marketplace, however, the FCC must ensure that independent ISPs have access to information needed to identify and utilize network functionalities in a non-discriminatory fashion. Absent structural separation, BOC affiliates will presumably have full access to the BOCs' network information, including descriptions of services available to ISPs, the incidence of such service requests, technical and service standards, and BOC plans to deploy new capabilities. It is therefore imperative that the Commission be mindful of ISP need for complete, timely information on a non-discriminatory basis.

Accordingly, AOL agrees that the FCC may streamline certain ONA and other reporting requirements if it adopts the nonstructural and structural safeguards advanced above.[44/] Reporting requirements cannot and should not be eliminated, however, to the extent they provide

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rules also require each carrier to submit a certification signed by a current corporate officer, as an agent of the corporation, attesting that he or she has personal knowledge that the carrier is in compliance with the CPNI requirements on an annual basis. This certification must be made publicly available, and be accompanied by a statement explaining how the carrier is implementing the CPNI rules and safeguards. Id. at ¶ 201.

43/ FNPRM at ¶ 100.

44/ For example, the FCC could eliminate its requirement that the BOCs file semi-annual ONA reports as long as the relevant information set forth therein is available through other means. See NPRM at ¶¶ 109-110. Similarly, Section 251(c)(5) network disclosure obligations in the 1996 Act may render the Computer III network disclosure obligations unnecessary. See FNPRM at ¶¶ 120-122.

necessary information which is not otherwise available, including information that will help the Commission and the public track and detect potentially anticompetitve conduct. CEI plans, for example, often constitute the only notice that unaffiliated ISPs have of BOC provision of information services at the present time. If the Commission seeks to rely upon the complaint process and monitoring by members of the public to alert it of abuses, it must, at a minimum, provide the public with adequate information regarding BOC activities.

Finally, AOL believes that several other nonstructural safeguards are necessary to prevent other sources of potential anticompetitive conduct. For example, the Commission should prohibit BOC joint marketing unless the BOC-affiliated information services are offered through a structurally separated affiliate. This rule would closely track the policy underlying the 1996 Act prohibition on joint marketing of local and long distance services before the local market has opened to competition.[45/] Similarly, AOL agrees that the disclosure obligations "all carrier rule" should continue to apply to all carriers owning basic transmission facilities.[46/]

45/ 47 U.S.C. § 271(e)(1).

46/ Under this rule, BOC separate affiliates must disclose information concerning "network design, technical standards, interfaces" and the manner in which their services will interoperate with the BOCs' network. See FNPRM at ¶ 119 (citing Computer II Final Order, 77 FCC 2d 384, 420 (1980)).

CONCLUSION

In light of the fact that ISPs and other competitors must still rely upon services provided by the former monopoly telecommunications carriers with whom they now compete, the Commission must ensure that ISPs are not foreclosed from fair, affordable access to the local exchange services and facilities necessary to offer their information services. For the foregoing reasons, AOL urges the Commission to adopt the structural and non-structural safeguards set forth herein as necessary to ensure that the market for information services remain open, robust, and fair.

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Dated: March 27, 1998

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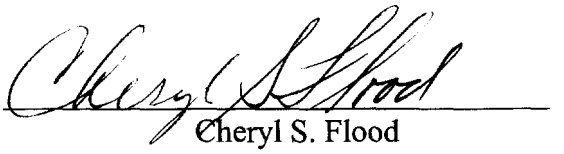
CERTIFICATE OF SERVICE

I, Cheryl S. Flood, hereby certify that on this 27th day of March, 1998, that a copy of the foregoing "Comments of America Online, Inc." to be sent by messenger, to the following:



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